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No. 94-12

In The

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

vs.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The questions presented in the certiorari petition are whether the Eleventh Amendment precludes Congress from authorizing tribal suits against the states, and whether *Ex parte Young* permits a governor to be sued for prospective injunctive relief to enforce provisions of the Indian Gaming Regulatory Act (IGRA). The Respondents' Brief, and the *amici curiae* Briefs of the National

Governors' Association, *et al.* and the State of California, *et al.*, address those questions and seek to expand the issues in this case with Tenth Amendment and article III arguments. Central to all of the efforts of Respondents is a view that IGRA offends state sovereignty. That view is incorrect, and the arguments seeking to escape *Ex parte Young* and abrogation are not persuasive.

ARGUMENT

I.

IGRA RESPECTS STATES' RIGHTS

The Respondents and their *amici* err in their attempts to portray IGRA as violative of states' rights. IGRA empowers the states; it does not encroach upon their rights. Before IGRA, the states had no power to regulate gaming on tribal lands. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 (1987). Respondents admit Congress could have excluded the states from any role in Indian gaming. (Resp. Br. 9) ("[Congress'] purposes can be achieved under Congress' complete power over the Tribes; no state involvement is necessary"). Therefore, IGRA's grant of power to the states, conditioned only on the duty to negotiate in good faith with Indian tribes, is protective of federalism. The themes of conflict and intrusion sounded by the Respondents and their *amici* misstate Congress' approach to balancing the federal/state/tribal interests at stake.

> To give Congress its due, the statute should be seen as a statement of its plenary power that does not raise constitutional questions. Congress could have bypassed the states, but in giving the states a role Congress did not cut into state sovereignty, it expanded it.

Richard L. Barnes, *Indian Gaming: Congress Sends the Tribes Into a Constitutional Fray, But Did It Intend To?* 64 Miss. Law J. 591, 596 (1995).

Thus, analysis of this case must begin with Congress' unique Indian Commerce Clause powers, and the Supremacy Clause duty of state officials to conform to federal laws enacted pursuant to those powers. *Ex parte Young,* 209 U.S. 123 (1908), provides a mechanism for judicial enforcement of the duty to follow federal law.

II.

EX PARTE YOUNG APPLIES

The Respondents' answer to *Ex parte Young* is that the Tribe's suit is really against the State; that IGRA's mandated duties involve discretion; and that the Tribe has not charged the Respondents with violating the Constitution. (Resp. Br. 27-36). The short reply is: (1) *all Ex parte Young* suits are against a state; (2) under IGRA there is no "discretion" to negotiate in bad faith; and (3) it is the Supremacy Clause and vindication of federal law, not just constitutional claims, which justify the *Ex parte Young* doctrine. The Respondents have failed to acknowledge *Young's* fiction, which allows suits against state officials to obtain prospective injunctive relief against states.

The Governors, recognizing that *Young's* fiction runs against states, add a "necessity" argument: "There can be no plausible claim that any structural *need* to vindicate the supremacy of federal law, on which *Young* rests, requires that state officials be subject to a judicial order that 'the state can disregard' for such an order does not '*secure* compliance with federal law'." Governors' *amicus* Br. 17 (emphasis added by Governors) (internal references to Petitioners' and United States' Briefs omitted). The Governors have misstated the Tribe's position,

confusing the goal of a compact with the means of securing it — good faith negotiations. Securing the Tribe's right to good faith negotiations *via Ex parte Young* serves the Supremacy Clause.

State disregard of a lack-of-good-faith final judgment is at the price of losing the legal ability to collaterally attack the resulting gaming. Such a judgment vindicates the supremacy of federal law by demanding adherence to IGRA's good faith requirement — a duty that Congress imposed to solve the delicate tri-sovereign dilemma, as the *sine qua non* for state participation. There can be no quarrel with the fact that under the Indian Commerce Clause Congress could have excluded the states from Indian gaming. Given the genesis of the Indian Commerce Clause (Pet. Br. at 18-21), IGRA's mandate of good faith negotiation is a proper use of the Clause's power. *Ex parte Young* is a principled basis for insuring that the federal formula for protecting state, federal and tribal interests is observed by the state beneficiaries.[1]

The justification for *Ex parte Young* — to insure compliance with federal law — is equally compelling whether that compliance is to vindicate Fourteenth Amendment rights, Indian Commerce Clause powers or other federally imposed responsibilities:

> [T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presumes some authority to order state officials to comply.

1. The states have received a benefit in IGRA. Indeed, the attempts to portray IGRA's grant of state authority and concomitant good faith negotiation obligation as unconstitutional perverts the concept of federalism which the states so vigorously espouse. Congress' sensitivity to federalism ought to be applauded by the states, not condemned.

New York v. United States, 112 S. Ct. 2408, 2430 (1992) (*citing, inter alia, Ex parte Young*). *See also, Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.").

The Respondents' offer of *Cory v. White*, 457 U.S. 85 (1982), as an antidote to *Ex parte Young* misses the mark. The *Cory v. White* statutory interpleader action was between two states seeking to tax Howard Hughes' estate. No federal interest was at stake; no allegation of federal law violation was made. Advancing *Cory v. White* as "analogous" (Resp. Br. 28) reveals the weakness of Respondents' argument. *Cory v. White* does not question the established doctrine that suits against state officials to compel compliance with federal law are not barred by the Eleventh Amendment.

Nor is the Respondents' new tack, that the Governor of Florida lacks the authority to negotiate, a tenable position. (Resp. Br. 30). This attempt to avoid *Ex parte Young* by claiming that the good faith duty is legislative is belied by the Respondents' Answer to the Complaint, which asserted that "Defendants State of Florida and Lawton Chiles, in his capacity as Governor of the State of Florida have negotiated in good faith" with the Tribe. J.A. 46a (Answer); *see also*, J.A. 15a-17a, 22a-23a ¶¶ 2 and 3, 36a, 41a (attachments to Complaint, admitting that the general counsel to the Governor represented the Governor *and* the State in compact negotiations). That admission by the Governor of Florida (and acknowledgment by other Governors that the power to negotiate is theirs)[2] undermines his attempt to avoid *Ex parte*

2. The Governors' Association *amicus* Brief, p. 20 n. 11, states: "With the exception of Kansas, we are aware of no evidence casting doubt on the complete authority of the Governor in each State, not only to negotiate, but to enter into compacts under IGRA."

Young by clothing the federal duty to negotiate with a state legislative cloak. The Governor accepted the federal duty to negotiate in good faith. He is a proper party for *Ex parte Young* purposes.

Finally, there is no force to the Respondents' argument that deciding IGRA good faith by deciding the scope of gaming permitted under Florida law (Resp. Br. 32), somehow adversely affects the *Ex parte Young* analysis. Under IGRA, good faith and scope of gaming are federal questions. Interpreting state law is a proper role for federal courts. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Many federal laws expressly incorporate or refer to state law. *See, e.g.*, Assimilative Crimes Act. 18 U.S.C. § 13; Johnson Act, 15 U.S.C. § 1172; Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2672, 2674. Other statutes have been judicially construed to incorporate state law. *See, e.g., DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("The scope of the federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law."); *Kamen v. Kemper Fin. Serv., Inc.*, 500 U.S. 90, 98 (1991) ("federal courts should 'incorporat[e] [state law] as the federal rule of decision' " *quoting United States v. Kimbell Foods, Inc.*, 400 U.S. 715, 728 (1979)).

Using state law to resolve the good faith federal question reflects Congress' respect for state interests. Instead of imposing a federal Indian gaming regime on the states, IGRA sought to accommodate state interests. *Ex parte Young* is an available method for reconciling the state and federal interests and tribal rights by insuring state officials' compliance with federal laws.

III.

IN IGRA, CONGRESS ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY

The Respondents acknowledge that "Congress' power under the Indian Commerce Clause is complete" and that regarding Indian affairs, "there are no limitations on Congress' authority to pass legislation affecting the Tribes." (Resp. Br. 23). They acknowledge that it "was not necessary" for Congress to have included the states in Indian gaming, *id.*, but then complain that allowing states to be sued by tribes constitutes "the indignity of subjecting a state to the coercive process of judicial tribunals at the insistence of private parties." *Ibid.*

The Respondents' argument is anomalous. IGRA expanded state authority, giving states a voice to which they were not otherwise entitled. Since Congress has plenary power, it must have the power to abrogate state immunity when it is enlarging state authority. To contend otherwise is inconsistent with the recognition of Congress' complete and unlimited powers in the area of Indian affairs. If Congress creates a role for the states, and then deems it necessary to hold the states answerable for their role, the states suffer no indignity. And, Tribes are not "private parties," but rather sovereigns whose lawsuits stand on different dignity footing than individuals' lawsuits. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 n. 1 (1991).

The Respondents say they "understand" the *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), view that the interstate commerce power needs to provide authority for Congress to render states liable to private parties for damages. (Resp. Br. 19-20). But they balk at abrogation power authorizing Indian tribes to seek prospective non-monetary relief, claiming that "complete power over Indian tribes" is different from the constitutional power "to

control relations among the states." *Id.* at 23. The Respondents mistakenly perceive the Indian Commerce Clause function. The clause takes all power from the states; it does not simply provide for federal rule over tribes. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832). Thus, the states must face an indisputable constitutional principle which arises from the fact that they long ago ceded all rights *vis a vis* tribes, save those which Congress allows. *Compare U.S. Term Limits, Inc. v. Thornton,* 63 U.S.L.W. 4413, 4420 (1995):

> "The state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that Act [adoption of the Constitution], *exclusively* delegated to the United States." The Federalist No. 32, at 198.
>
> * * *
>
> As we have frequently noted, "[t]he states unquestionably do retain a significant measure of sovereign authority. They do so, however, *only to the extent that the Constitution has not divested them of their original powers* and transferred those powers to the Federal Government. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 549 (1985) (internal quotation marks and citation omitted) (emphasis added); see also *New York v. United States,* 505 U.S. ___, ___(slip op., at 8-9 (1992).

The states retain authority and power to validly legislate and regulate matters which affect interstate commerce. The Interstate Commerce Clause only prohibits those acts which interfere with

such commerce. *West Lynn Creamery, Inc. v. Healy,* 114 S. Ct. 2205, 2211 (1994):

> Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. . . . (quoting *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273-274 (1988)).

Indeed, the most important aspect of the Interstate Commerce Clause was "as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the General Government." *West Lynn Creamery,* 114 S. Ct. at 2211 n. 9 (*citing* 3 M. Farrand, *Records of the Federal Convention of 1787,* p. 478 (1911), *quoting* James Madison). In contrast, the Indian Commerce Clause left the states with no sovereign authority in the sphere of Indian affairs and commerce; that authority is exclusively delegated to the Congress by the Constitution. Thus, it is not inconsistent with the Eleventh Amendment, or the common law sovereignty upon which the amendment is founded, to conclude that the necessary and complete exercise of the exclusive federal Indian Commerce Clause powers must include Congress' right to abrogate state immunity when it expands state authority into Indian areas where the states would otherwise be wholly excluded. *Compare Morton v. Mancari,* 417 U.S. 535 (1974):

> Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status to legislate on behalf of federally recognized

> tribes. The plenary power of Congress to deal with the social problems of Indians is drawn both explicitly and implicitly from the Constitution . . . [which] singles Indians out as a proper subject for separate legislation.

Id. at 551-552. The *Morton* Court unanimously upheld Indian employment preferences in the Bureau of Indian Affairs. The racial classifications did not violate the Fifth Amendment: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. The result should be the same in this case.

The distinctions between the Interstate Commerce Clause and the Indian Commerce Clause underscore why the Respondents' invitation to revisit *Union Gas* should be rejected. *Union Gas'* use of the positive and negative Interstate Commerce Clause function as a basis for the power to abrogate is helpful, but not critical to this case. Congress' special powers, duties, and obligations under the Indian Commerce Clause make the abrogation power more necessary than that needed for interstate commerce. (*See* Pet. Br. 19-21; U.S. Br. 22-24). Thus *Union Gas* need not be the basis for decision here.[3]

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3. One *amicus* brief suggests that Congress did not clearly intend to abrogate Eleventh Amendment immunity in IGRA. (Governors' Br. 19-20). Every court which has addressed that question, including the court below, has found the intent to abrogate to be unmistakenly clear. (*See, e.g.*, Pet. Cert. App. 14a-15a (citing cases)); *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994); *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994); *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993). *See also*, Note, *Upping the Ante: Allowing Indian Tribes to Sue States in Federal Court Under the Indian Gaming Regulatory Act*, 62 Geo. Wash. L. Rev. 123, 158 (1993) ("No court has even concluded that the question is a close one. Congress clearly has authorized abrogation"). Indeed, neither the Respondents nor the *amici* states assert the no-clear-statement argument.

IV.

THE TENTH AMENDMENT IS NOT AN ISSUE IN THIS CASE

The Brief of the Respondents raises a question as to the consistency of IGRA with the Tenth Amendment. (Resp. Br. 24-25). That question is also advanced and argued in the Brief of the *amici* states (pp. 23-28). The Tenth Amendment issue is not properly before the Court in this case.

As the Respondents acknowledge, the Tenth Amendment issue was not raised in the district court, which thus had no occasion to rule on it.[4] In the Eleventh Circuit, the court noted that the Respondents "raised one issue [the Tenth Amendment issue] for the first time on appeal." (Pet. App. 2a-3a n. 2). The Eleventh Circuit declined to address that issue, relying on its settled practice of not considering issues on appeal which were not raised in the district court. *Id.* That procedural history precludes its presentation here: "We do not reach for constitutional questions not raised by the parties," *Mazer v. Stein*, 347 U.S. 201, 206 n. 5 (1954), or "not raised or resolved in the lower court," *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

This Court's Rule 14.1(a) states: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." Only in the most exceptional circumstances will the Court consider issues not presented in the petition. *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); *United States v. Williams*, 504 U.S. 36 (1992).

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4. Respondents assert that this failure was because this Court's decision in *New York v. United States*, 112 S. Ct. 2408 (1992), "had not been issued at the time of the filing of the complaint and motions in this case." (Resp. Br. 33). But Respondents do not explain their failure to anticipate the Tenth Amendment issue even before the *New York* ruling, or their failure to amend their pleadings after the ruling of this Court.

In this case, the Seminole Tribe's petition for certiorari and Brief on the merits present two Eleventh Amendment questions: an abrogation question, and *Ex parte Young*. The response to the certiorari petition did not quarrel with those two questions nor argue, as is now asserted in Respondents' merits Brief (p. 33), that a Tenth Amendment problem is somehow subsumed in the *Ex parte Young* question.[5] Nor did the Respondents' cross-petition for certiorari (still pending before this Court, *State of Florida v. Seminole Tribe*, No. 94-219) seek to present a Tenth Amendment issue.

Rule 14.1(a) excludes the Tenth Amendment issue from this case. This Court should again "disapprove the practice of smuggling additional questions into a case after we grant certiorari." *Irvine v. California*, 347 U.S. 128, 129 (1954) (Jackson, J.) (plurality).[6]

Finally, there is no extraordinary reason for this Court to address the Tenth Amendment. This case can be decided solely within the parameters of the two Eleventh Amendment questions that have been raised and argued in both the lower courts and this Court. If the Court wishes to address the Tenth Amendment issue, it will find an opportunity to do so in the pending petition for

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5. Respondents' Brief (p. 33) states that because the Seminole Tribe "asserts that the dictates of IGRA are mandatory, thereby allowing an injunction to be issued under *Ex parte Young*" the Tenth Amendment question "is therefore subsumed within the second question posed by the Petitioner and accepted for review by this Court." But the Tribe's argument as to the mandatory nature of the State's duty under IGRA to negotiate in good faith only goes to the *Ex parte Young* exception to Eleventh Amendment immunity, not to any or all other constitutional propositions that might be asserted with respect to that duty.

6. *See also*, R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice*, § 6.26 (7th ed. 1993).

certiorari in No. 94-1029, *Oklahoma v. Ponca Tribe of Oklahoma*. A question presented in that petition concerns the Tenth Amendment implication of IGRA, an issue that was fully canvassed and dealt with by the Tenth Circuit, 37 F.3d 1422 (10th Cir. 1994), which accurately concluded that IGRA poses no unconstitutional usurpation of powers reserved to the states.

V.

THIS CASE IS JUSTICIABLE

One aspect of the *amici* National Governors' Association argument proceeds from this assumption:

> Even if the court agrees with the Tribe's complaint that the state is acting unlawfully (i.e., is failing to negotiate in good faith), the court cannot issue an enforceable order that vindicates the interests asserted in the suit; indeed, real relief for the Tribe ultimately is available only from the Executive Branch.

Amicus Br. of National Governors' Assoc., *et al.* 7. The argument is put this way: "What IGRA provides for, in short is a wholly unenforceable judicial pronouncement." *Id.* at 12. However, the Governors' submission is based upon the erroneous premise that a final judgment finding that a state has failed to negotiate pursuant to IGRA is not "real relief" to the Tribe. It is; such a judgment vindicates the interests asserted in the Seminoles' suit.

The Governors demean the importance of the relief sought, calling it "only a paper vindication" because "the Tribe cannot, in its lawsuit, judicially secure a compact or other authority for Class III gaming." National Governors' Assoc. *amicus* Br. 11. But the Governors overlook the significant legal consequences

which flow from a favorable final judgment on the scope of permitted gaming and a state's refusal to negotiate in good faith. That judgment could foreclose the State from blocking class III gaming through the compacting process and would provide the Tribe with *res judicata* or collateral estoppel protection which would preclude the State's subsequent attack on a mediator's compact, or a Secretary's order, or authorized tribal gaming. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979). The method by which the ultimate gaming rights are achieved (negotiation, mediation, promulgation of rules by the Secretary of the Interior) is not important to article III analysis. The judicially enforceable findings of fact and conclusions of law regarding permitted gaming and good faith lead to an alternative path for securing class III gaming, and provide real relief against future state actions which might attempt to interfere with the tribal gaming.[7]

The other jurisdictional barrier perceived by *amici* is founded on two article III principles: that the judicial power must be conclusive, not advisory, and that the power must not be subject to later administrative review or alteration. IGRA does not offend either principle.

The "general rule" is "that 'executive or administrative duties of a nonjudicial nature may not be imposed on judges

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7. The Respondents do not embrace the Governors' contention; Respondents acknowledge the force and effect of the relief sought:

> The State views the provisions of IGRA as far more coercive. . . . Here for example, the federal district court construed Florida laws governing gambling. Presumably, it was prepared to enforce the provisions of IGRA based on its interpretation of Florida law, and to specify what the state was required to negotiate.

Resp. Br. 6.

holding office under Article III of the Constitution.' " *Morrison v. Olson,* 487 U.S. 654, 677 (1988). And, "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm, Inc.,* 115 S.Ct. 1447, 1453 (1995). The cited cases standing for these rules — *United States v. Ferreira,* 54 U.S. (13 How.) 40 (1851); *Hayburn's Case,* 2 U.S. (2 Dall.) 408 (1792); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103 (1948) — demonstrate why they do not apply to IGRA.

Hayburn's Case evolved from a statute making article III judges arbiters of disability pension amounts, leaving the Secretary of Interior free to adopt or reject the awards. In *Ferreira,* a federal court in Florida was authorized by Congress to decide, and report to the Secretary of the Treasury, claims arising from the 1819 treaty which ceded Florida to the United States. The Secretary of the Treasury had the final decisionmaking authority as to payment. *See Morrison v. Olson,* 487 U.S. at 677-678 n. 15; *Interstate Commerce Comm'n v. Brimson,* 154 U.S. 447, 480-83 (1894). In *Chicago & Southern Airlines,* the President had final authority to pass on certificates for foreign air transportation, rendering judicial review of Civil Aeronautics Board orders to be both premature and political questions, beyond the powers of article III courts.

While IGRA specifies a post-judgment role for the Secretary of the Interior, that role does not involve reconsideration of a judicial determination that a state has failed to negotiate in good faith. Thus, the Secretary's role is entirely different from that of the Secretary of War in *Hayburn's Case*; different from that of the Secretary of the Treasury under the legislation considered in *Ferreira*; and different from that of the President in *Chicago & Southern Air Lines Corp.* Under IGRA, when a court rules that a state has failed to negotiate in good faith, the Secretary of the Interior eventually may prescribe "procedures [for class III

gaming] . . . which are consistent with the proposed compact selected by the mediator . . . , the provisions of [IGRA], and the relevant provisions of the laws of the state." 25 U.S.C. § 2710(7)(B)(vii). The Secretary cannot in any way, however, modify the determination of the court that a state has failed to negotiate in good faith. IGRA does not permit or condone revisionary authority by either the executive or legislative branches. The judicial decision is the last word by the judicial branch regarding the IGRA case or controversy. *Compare Plaut,* 115 S.Ct. at 1457 ("Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.") (emphasis in original).

Consistent with article III, Congress may provide a partial judicial remedy, even if that remedy permits additional government action. As long as the judgment of the court is not itself to be modified by later executive or administrative orders, the court's decision need not be the last word in the ultimate resolution of a larger issue. To paraphrase *ICC v. Brimson:*

> If it be adjudged that the [Respondents] are, in law, obliged to do what they have refused to do [negotiate in good faith], that determination will not be merely ancillary and advisory, but in the words of *Sanborn's Case,* will be a "final and undisputable basis of action," as between the [Tribe and the Secretary of the Interior and the State] and will furnish a precedent in all similar cases. . . . It is nonetheless the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the

> customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

154 U.S. at 487. Thus, the fact that the Secretary of the Interior may later depend on the court's determination of the scope of state-permitted gaming and the state's good faith or lack thereof, does not make those judicial determinations inconsistent with article III power. The Tribal lawsuit sought to provide the legal foundation for the compact. The good faith/scope of gaming judgment authorized by IGRA performs that article III function by deciding whether the State has discharged its federal duty to negotiate in good faith.

CONCLUSION

The decision below should be reversed either because the Indian Commerce Clause provides Congress with the power to abrogate Eleventh Amendment immunity to allow Indian tribes' suits for prospective, non-monetary relief, or because *Ex parte Young* permits such suits against the state officers discharging the federal duties created by IGRA.

Respectfully submitted,

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